NO. 100008-1

SUPREME COURT OF THE STATE OF WASHINGTON

In re Welfare of:

N.G.,

Petitioner.

DEPARTMENT OF CHILDREN, YOUTH, AND FAMILY'S RESPONSE BRIEF

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I. INTRODUCTION

Interlocutory review is strongly disfavored. RAP 2.3(b) reflects this principle by imposing specific and stringent standards for discretionary review. Like other discretionary review standards, RAP 2.3(b)(2) is narrow. It provides for review based on a showing of probable error, but only where the superior court's action has immediate effects beyond the litigation. This plain meaning is supported by appellate decisions and noted commentators. This Court should affirm this workable interpretation of RAP 2.3(b)(2). For truly exceptional cases that do not satisfy other discretionary review standards, review is available under RAP 2.3(b)(3), which embodies this Court's broad revisory jurisdiction, or by invoking RAP 1.2(c) to alter or waive the discretionary review standards.

In this case, under any interpretation of RAP 2.3(b)(2), the Court of Appeals correctly denied review of the order allowing J.R. to intervene in the dependency proceeding. J.R.'s participation does not have an immediate substantial effect either

outside the litigation or within it. It does not undermine the objective of safely reuniting N.G. with his family or complying with the parents' due process rights. The mother's speculative concerns about potential future interference in the dependency proceeding can be promptly addressed through discretionary review if and when such interference arises. This Court should affirm the Court of Appeals' denial of review.

If this Court reverses the Court of Appeals, it should affirm the order permitting J.R. to intervene. The mother's argument that the trial court did not adequately consider the potential for prejudice from intervention is misplaced. J.R. correctly quoted the relevant language of CR 24, and judges are presumed to follow the law. On the unique facts of this case, the juvenile court acted within its discretion in allowing J.R. to intervene.

II. STATEMENT OF THE CASE

This dependency proceeding concerns ten-year-old N.G. N.G. was born in late 2011 to the mother and the father, J.G.

CP 60. At least until this dependency proceeding began, J.G. played no meaningful role in N.G.'s life. CP 63, 76; RP 8.

In mid-2014, when N.G. was two-and-a-half years old, the mother and J.R. began a relationship. CP 31, ~~93~~97. In mid-2015, they had a child together, N.G.'s half-brother, and married later that year. CP 31, 61. The couple separated in mid-2016. CP 31. At that time, both N.G. and his sibling[1] continued to reside with the mother and had regular visitation with J.R. CP 31, 102. Though there is some dispute regarding specifics about the visitation between N.G. and J.R., it is undisputed that visitation occurred. *See* CP 25-26, CP 31-32.

In August 2020, the Department received a report alleging that the mother was neglecting and mistreating N.G. and his sibling, including locking the children in their bedrooms for extended periods and exposing them to drug paraphernalia. CP 61-62. During an interview with a Department social worker,

[1] "Sibling" includes a "half-brother." RCW 13.34.030(25).

N.G. disclosed physical abuse by the mother. CP 62. The Department's investigation also revealed other troubling reports about the safety of the children while in the mother's care. CP 3-4. In late September, law enforcement took N.G. and his sibling into protective custody, and the Department promptly filed dependency petitions as to both children. CP 60, 63.

In October 2020, the juvenile court entered an agreed shelter care order that placed N.G. and his sibling with J.R. CP 66, 69. The following month, in an agreed order of dependency, the mother agreed to continue that placement. CP 7. Around this time, J.R. initiated a separate action seeking non-parental custody as to N.G. *See* CP 87. In a motion simultaneously filed in the dependency cases for both N.G. and his sibling, J.R. sought concurrent jurisdiction to allow the family court to act on his pending motions in separate proceedings.[2]

[2] As discussed below, *see supra* at 44-45, the juvenile court generally must grant concurrent jurisdiction before another division of the superior court may act with respect to a dependent child. RCW 13.04.030(1)-(2).

CP 87-88. The dependency court granted concurrent jurisdiction as to N.G.'s sibling, allowing J.R. to proceed with modifying a parenting plan, but "denied at this time" concurrent jurisdiction as to N.G. CP 12.

In December 2020, J.R. filed a petition for de facto parentage as to N.G. CP ~~90-96~~94-100. The dependency petition as to N.G.'s sibling was dismissed in early 2021. CP 21-22, 26.

J.R. filed a motion to intervene in N.G.'s dependency proceeding in January 2021. CP 14-20. In his motion, J.R. stated that he sought intervention "so that [he] can proceed forward with his filed De Facto Parentage case[.]" CP 20. In his declaration, J.R. stated that he wants the mother "to take advantage of the resources being provided to her by the Department" and that his motion to intervene "does not impact Mother's ability to work on her Dependency." CP 27-28.

The guardian ad litem supported J.R.'s motion to intervene, stating that N.G. refers to J.R. as "Dad" and that the

two "have a bonded relationship that is parent-child in nature." CP 102.

The mother opposed J.R.'s motion to intervene. She contended that permitting intervention would "open a flood gate of people to come forward and argue they are de facto parents turning Dependency Court into arguments over parenting plans instead of working on reuniting families." CP 23. In an untimely declaration, the mother alleged that J.R. had previously excluded N.G. from visits on some occasions. CP 32-33.

On the motion to intervene, the juvenile court agreed to consider the mother's untimely declaration as "something that should be considered by the Court in reaching its determination." RP 20. The following day, the juvenile court granted J.R. permission to intervene under CR 24(b). CP 52-53. The mother filed a timely notice for discretionary review. CP 54.

The Court of Appeals commissioner denied review. The commissioner concluded that the juvenile court committed probable error but that the effects prong of RAP 2.3(b)(2) was

not satisfied. Ruling Denying Review at 4-5. The commissioner concluded that the ruling did not have a substantial effect outside the courtroom or within the dependency litigation. *Id*. at 5. A panel of judges denied the mother's motion to modify. Order Denying Motion to Modify at 1.

This Court's commissioner entered a ruling granting review "(1) to definitively settle the meaning of RAP 2.3(b)(2) and RAP 13.5(b)(2), and if those criteria are satisfied for purposes of interlocutory review, (2) to determine whether the superior court reversibly erred in allowing J.R. to intervene in the dependency." Ruling Granting Review at 5-6.

III. ISSUES PRESENTED

1. The Court of Appeals denied discretionary review based on the absence of substantial effects outside or within the dependency proceeding. Did the Court of Appeals permissibly deny review under RAP 2.3(b)(2)?

2. Does the denial of discretionary review by the Court of Appeals warrant review by this Court under RAP 13.5(b)(2)?

3. J.R. had been a step-father to N.G., hosted regular visits, and filed a de facto parentage petition. N.G. regarded J.R. as his step-father, and J.R. is the father of N.G.'s sibling. Did the dependency court abuse its discretion in permitting J.R. to intervene?

IV. ARGUMENT

A. The Court of Appeals Correctly Interpreted the RAP 2.3(b)(2) Standard

The Court of Appeals correctly concluded that RAP 2.3(b)(2) is reserved for superior court decisions that have "effects beyond the parties' ability to conduct the immediate litigation." *State v. Howland*, 180 Wn. App. 196, 207, 321 P.3d 303 (2014). This interpretation, which this brief refers to as the "*Howland* interpretation," reflects the rule's plain meaning, has gained acceptance in the Court of Appeals, is advocated by noted commentators, and is supported by sound policy considerations.

Importantly, while RAP 2.3(b) imposes "specific and stringent" limits on discretionary review, *City of Seattle v. Holifield*, 170 Wn.2d 230, 245, 240 P.3d 1162 (2010) (quoting

Geoffrey Crooks, *Discretionary Review of Trial Court Decisions Under the Washington Rules of Appellate Procedure*, 61 Wash. L. Rev. 1541, 1545 (1986)), those limits are not absolute. Both RAP 2.3(b)(3), which allows for review of exceptional cases, and RAP 1.2(c), which allows appellate courts to "waive or alter the provisions" of RAP 2.3 "to serve the ends of justice," ensure that truly meritorious cases will not escape discretionary review.

1. The plain meaning of RAP 2.3(b)(2) requires effects beyond the litigation

This Court interprets court rules de novo. *Stout v. Felix*, 198 Wn.2d 180, 184, 493 P.3d 1170 (2021). The interpretation of a court rule "begin[s] with the plain meaning of the rule." *Id*. (citing *State v. McEnroe*, 174 Wn.2d 795, 800, 279 P.3d 861 (2012)). "The plain language of the rule is not read in isolation but 'in context, considering related provisions, and in light of the statutory or rule-making scheme as a whole.'" *Id*. (quoting *State v. Stump*, 185 Wn.2d 454, 460, 374 P.3d 89 (2016)). This Court "avoid[s] interpreting court rules in a manner that would render

substantive portions meaningless." *Phongmanivan v. Haynes*, 195 Wn.2d 309, 313-14, 458 P.3d 767 (2020).

In light of the context and text of RAP 2.3(b)(2), the *Howland* interpretation correctly reflects the rule's plain meaning.

RAP 2.3(b)(2)[3] is one of four alternative standards that a party seeking interlocutory review must satisfy. Under RAP 2.3(b)(2), a party must satisfy two prongs. One prong requires a demonstration that "[t]he superior court has committed probable error." RAP 2.3(b)(2). The other prong, commonly referred to as the "effects prong," requires that the alleged error "substantially alters the status quo or substantially limits the freedom of a party to act." *Id*.

The plain meaning of RAP 2.3(b)(2) requires effects beyond the immediate litigation for at least four reasons. First,

[3] "The superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act."

the *Howland* interpretation follows from the very structure of RAPs 2.2 and 2.3. Second, a broader interpretation would render the obvious-error standard of RAP 2.3(b)(1) superfluous. Third, RAP 2.3(b)(3) already operates as a catchall provision for truly exceptional cases. And fourth, the text itself supports the *Howland* interpretation.

a. The structure of RAPs 2.2 and 2.3 supports the *Howland* interpretation

The very structure of the provisions regarding appellate review support the *Howland* interpretation. They do so by codifying the long-recognized principle that "[i]nterlocutory review is disfavored." *Minehart v. Morning Star Boys Ranch, Inc.*, 156 Wn. App. 457, 462, 232 P.3d 591 (2010) (citing *Maybury v. City of Seattle*, 53 Wn.2d 716, 721, 336 P.2d 878 (1959)); *see also, e.g.*, *Holifield*, 170 Wn.2d at 246 (stating that interlocutory review is an "extraordinary remed[y] granted sparingly"); *Hartley v. State*, 103 Wn.2d 768, 773, 698 P.2d 77 (1985) ("Judicial policy generally disfavors interlocutory appeals."); Crooks, 61 Wash. L. Rev. at 1547 ("The appellate

system operates with a plain and intentional bias against interlocutory review.").

RAPs 2.2 and 2.3 collectively determine when appellate review of superior court decisions is available. Appeal as a matter of right is typically limited to final decisions, but it is also available for certain sufficiently important interlocutory decisions, such as a disposition order in a dependency proceeding. *E.g.*, RAP 2.2(a)(5). For all other superior court actions, a party must seek "discretionary review." RAP 2.3(a).

In order to obtain discretionary review, a party must satisfy RAP 2.3(b)'s "specific and stringent" limits. *Holifield*, 170 Wn.2d at 245 (quoting Crooks, 61 Wash. L. Rev. at 1541, 1545 (1986)). Those limits are reflected in RAP 2.3(b)'s requirement that a party meet one of four "very demanding standards," *State v. Chelan Cnty. Dist. Ct.*, 189 Wn.2d 625, 631, 404 P.3d 1153 (2017), which impose a "heavy burden," *In re Dependency of Grove v. State*, 127 Wn.2d 221, 235, 897 P.2d 1252 (1995).

The differing treatment of superior court actions in RAPs 2.2 and 2.3 embodies the strong judicial preference against interlocutory review. In practice, courts adhere to this principle, granting motions for discretionary review in a small percentage of cases. *In re Dependency of Grove*, 127 Wn.2d at 235-36 (reflecting that less than ten percent of motions for discretionary review were granted).

The *Howland* interpretation best embodies the deeply-embedded preference against interlocutory appeals by reserving the less demanding probable error standard for those superior court actions that have the most significant, frequently irreversible impacts (i.e., impacts that are felt beyond the courtroom).

The broad interpretation advocated by the mother, by contrast, is inconsistent with the hierarchy created by RAPs 2.2 and 2.3. Under the mother's interpretation, discretionary review is arguably available for *every* error by the superior court. Every time the superior court grants a motion, it alters the status quo of

the litigation in some way. Whether that motion is to exclude evidence at trial, to allow a party to amend a pleading, or some similar request, granting the motion alters the status quo of the litigation and would potentially satisfy the mother's broad interpretation of RAP 2.3(b)(2).

Under the mother's interpretation, the only meaningful limitation imposed by the effects prong of RAP 2.3(b)(2) is that the alleged error be "substantial." But substantiality is in the eye of the beholder. A skillful advocate can cast almost any error as having a substantial effect. The mother's interpretation fails to give effect to the long-recognized principle, embedded in the structure of RAPs 2.2 and 2.3, that discretionary review is disfavored. The RAP 2.3(b)(2) standard would no longer be "very demanding," *Chelan Cnty. Dist. Ct.*, 189 Wn.2d at 631, or impose a "heavy burden," *In re Dependency of Grove*, 127 Wn.2d at 235.[4]

[4] While the mother correctly observes that satisfying the RAP 2.3(b) standard is necessary but not sufficient to justify

In sum, the structure of the provisions regarding appellate review embody a strong preference against interlocutory review. The *Howland* interpretation reflects this structure by confining the scope of RAP 2.3(b)(2) to those superior court actions most urgently requiring appellate review.

b. The *Howland* interpretation preserves RAP 2.3(b)(1)'s independent meaning

The broad interpretation of RAP 2.3(b)(2)'s effects prong advocated by the mother would render RAP 2.3(b)(1) superfluous and ignore the independent role of each standard. Every case that might qualify for review under RAP 2.3(b)(1)'s obvious-error standard would already qualify under the less-demanding probable error standard. If an error is "obvious" (i.e., "clearly contrary to existing statute or case law," 1 Wash. State Bar Ass'n, *Washington Appellate Practice Deskbook* § 4.4(2)(a) (4th ed. 2016)), it is also necessarily at-least "probable." And if the error "would render further proceedings useless," it also

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review, Br. of Pet'r at 37-38, it is the standards themselves that are "specific and stringent." *Holifield*, 170 Wn.2d at 245.

"substantially alters the status quo" of the litigation by changing it from a meaningful legal action to "useless" litigation. As a result, having satisfied the probable error standard advocated by the mother, there would never be a need to go further and meet the more demanding obvious-error standard. In that way, the mother's broad interpretation improperly renders RAP 2.3(b)(1) "meaningless." *Phongmanivan*, 195 Wn.2d at 313-14; *see also* Judge Stephen J. Dwyer, *The Confusing Standards for Discretionary Review in Washington and a Proposed Framework for Clarity*, 38 Seattle U. L. Rev. 91, 103 (2014) (recognizing that RAP 2.3(b)(1) "would be rendered nugatory").

The mother's argument to the contrary misses the mark. The mother argues that her interpretation does not render RAP 2.3(b)(1) superfluous because "there will . . . be times when the court's probable error substantially affects the course of the litigation but does not necessarily render further proceedings useless." Br. of Pet'r at 35. This is true but unhelpful. Even if RAP 2.3(b)(2) were broader than RAP 2.3(b)(1), the

fundamental problem remains—under the mother's interpretation, cases satisfying RAP 2.3(b)(1) would be a subset of cases satisfying RAP 2.3(b)(2).

The mother further argues that "there will also be times when a case fits squarely within the prior caselaw that is now incorporated into subsection (b)(1)." Br. of Pet'r at 35. This appears to build on the mother's suggestion that RAP 2.3(b)(1) was merely included as reassurance to practitioners that "the RAPs were not intended to displace" preexisting case law (and, therefore, RAP 2.3(b)(1) was not intended to have any independent effect). Br. of Pet'r at 34. But that is squarely inconsistent with the well-established principle that court rules are interpreted to avoid "render[ing] substantive portions meaningless." *Phongmanivan*, 195 Wn.2d at 313-14.

The *Howland* interpretation of the effects prong gives RAP 2.3(b)(1) and RAP 2.3(b)(2) independent meanings and avoids rendering either superfluous. Alleged errors that have no effect beyond the litigation are addressed under RAP 2.3(b)(1)

and must satisfy the particularly demanding obvious-error standard. By contrast, alleged errors that *do* have an impact beyond the litigation need only satisfy the less demanding probable error standard.

c. Other rules already provide for review of exceptional cases

Context also supports the *Howland* interpretation because RAP 2.3(b)(3) already provides a catchall provision for exceptional cases, and RAP 1.2(c) provides a further backstop. In light of these provisions, this Court has correctly observed that "as a practical matter, for meritorious claims, the discretionary review screening should present no great obstacle to obtaining review by an appellate court under RAP 2.3(b)." *In re Detention of McHatton*, 197 Wn.2d 565, 572, 485 P.3d 322 (2021) (quoting *In re Detention of Petersen*, 138 Wn.2d 70, 89, 980 P.2d 1204 (1999)). The mother's proposal to expand the application of the probable error standard is unwarranted and unnecessary.

Under RAP 2.3(b)(3), an appellate court may grant review where "[t]he superior court has so far departed from the accepted

and usual course of judicial proceedings, or so far sanctioned such a departure by an inferior court or administrative agency, as to call for review by the appellate court." This standard embodies (and extends to the Court of Appeals) this Court's "inherent power to review" under Washington Constitution article IV, § 4. *Federal Way Sch. Dist. No. 210 v. Vinson*, 172 Wn.2d 756, 768, 261 P.3d 145 (2011).

The drafters intended RAP 2.3(b)(3) to "govern[ ] the relatively unusual case calling for the exercise of revisory jurisdiction." 2A Elizabeth A. Turner, *Washington Practice: Rules Practice* RAP 2.3 cmt. 10 (8th ed. WL); *see also State v. Mail*, 65 Wn. App. 295, 300, 828 P.2d 70 (1993) (applying revisory jurisdiction understanding of RAP 2.3(b)(3)), *aff'd on other grounds by*, 121 Wn.2d 707, 854 P.2d 1042 (1993). This Court's "revisory jurisdiction" is recognized in the same provision of the Washington Constitution (article IV, section 4) that creates an "inherent power to review." *Vinson*, 172 Wn.2d at 768. That power is sufficiently robust to overcome even

statutory prohibitions on appellate review. *Parker v. Wyman*, 176 Wn.2d 212, 216-17, 289 P.3d 628 (2012).

In short, RAP 2.3(b)(3) embodies a powerful principle, allowing for review notwithstanding other limitations, but it expressly reserves that power for exceptional cases, where the superior court has "*so far* departed" or "*so far* sanctioned such a departure." Properly understood, RAP 2.3(b)(3) functions as a powerful-but-narrow catchall standard.

The Court of Appeals has not always been rigorous in requiring a demanding standard under RAP 2.3(b)(3). *See, e.g.*, *Young v. Key Pharms., Inc.*, 63 Wn. App. 427, 819 P.2d 814 (1991) (granting review under RAP 2.3(b)(3) to review pretrial evidentiary ruling). And Washington Practice suggests that the so-far-departed standard is intended "to give the appellate courts maximum discretion in deciding whether to grant or deny discretionary review." 2A Elizabeth A. Turner, *Washington Practice: Rules Practice* RAP 2.3 cmt. 5 (8th ed. WL). But such

a broad interpretation, allowing review at the appellate court's discretion, would render RAP 2.3(b)(1), (2), and (4) superfluous.

In addition, under RAP 1.2(c), appellate courts "may waive or alter the provisions of any of these rules in order to serve the ends of justice[.]" The Court of Appeals has expressly altered the RAP 2.3(b) standard in "limited circumstances." *Ohnemus v. State*, 195 Wn. App. 135, 137 n.1, 379 P.3d 142 (2016) (sua sponte granting discretionary review and citing RAP 1.2(a)); *Walden v. City of Seattle*, 77 Wn. App. 784, 789-90, 892 P.2d 745 (1995) (relying on RAP 1.2(c) to waive the effects prong of RAP 2.3(b)(1) and (2) with respect to federal immunity rights).

The roles played by RAP 2.3(b)(3) and RAP 1.2(c) support the *Howland* interpretation. In light of these related provisions, it makes little sense to adopt a broad application of the probable error standard.

d. The text supports the *Howland* interpretation

Even if read in isolation, two features of the text of RAP 2.3(b)(2) support the *Howland* interpretation. First, in

contrast to the obvious-error standard of RAP 2.3(b)(1), the text does not expressly contemplate effects on "further proceedings." This suggests that the drafters intended only the obvious-error standard to consider effect on further proceedings. *See Cannabis Action Coal. v. City of Kent*, 183 Wn.2d 219, 229, 351 P.3d 151 (2015) ("Where the language of a statute differs, we presume the difference is intentional and give the difference effect."). Second, the undefined terms "status quo" and "freedom to act" are consistent with a focus beyond the immediate litigation, *see* Dwyer, 38 Seattle U. L. Rev. at 102-03.

These features of the isolated text of RAP 2.3(b)(2) support the *Howland* interpretation. And in light of the fact that provisions are read "not in isolation but 'in context,'" *Stout*, 198 Wn.2d at 184 (citation omitted), the plain meaning of RAP 2.3(b)(2) is unambiguous and correctly captured by the *Howland* interpretation.

2. The *Howland* interpretation is widely accepted and advances important policies

The widespread acceptance of the *Howland* interpretation and the policies it advances further support its adoption by this Court.

There is increasing acceptance of the *Howland* interpretation in the Court of Appeals and among commentators. The first commentary in support of the *Howland* interpretation appears in the comments from the task force that drafted RAP 2.3(b). That commentary, which accompanied the 1976 adoption of RAP 2.3(b), stated that RAP 2.3(b)(2) "applies primarily to orders pertaining to injunctions, attachments, receivers, and arbitration . . . ." 2A Elizabeth A. Turner, *Washington Practice: Rules Practice* RAP 2.3 (8th ed. WL). The common thread among those examples is that each has an effect outside the litigation.

Based in large part on the drafters' intent, former Commissioner Crooks (the "longest-serving" commissioner of this Court, Ruling Granting Review at 4), first articulated the

Howland interpretation in a persuasive 1985 law review article. Crooks, 61 Wash. L. Rev. at 1546. In 2014, the Court of Appeals whole-heartedly adopted this interpretation in *Howland*. 180 Wn. App. at 207. Later that year, Judge Dwyer and colleagues published a law review article strongly advocating the *Howland* interpretation. Dwyer, 38 Seattle U. L. Rev. at 102-06.

Since 2014, Court of Appeals commissioners have increasingly relied on the *Howland* interpretation. *E.g.*, *Lundquist v. Seattle Sch. Dist. No. 1*, No. 80312-3-I, 2019 WL 7483935, at *3 (Wash. Ct. App. Dec. 18, 2019) (Commissioner's Ruling Denying Review) (denying review under RAP 2.3(b)(2) based on absence of impact outside litigation).

In 2016, the Washington Appellate Practice Deskbook also adopted the *Howland* interpretation: "[The RAP 2.3(b)(2)] standard typically requires a party to show that the party's substantive rights will be impaired in some fundamental manner outside the pending litigation." 1 *Washington Appellate Practice*

Deskbook at 4-37. The mother notes, correctly, that prior to *Howland*, the Washington Appellate Practice Deskbook articulated a broad view of RAP 2.3(b)(2) and that, after *Howland*, it articulated the *Howland* interpretation. Br. of Pet'r at 27-29. The likely reason for this is twofold. First, *Howland* provides detailed and highly persuasive reasoning supporting its interpretation. *Howland*, 180 Wn. App. at 206-08. Second, the 2011 version of the Washington Appellate Practice Deskbook was *describing* the pre—*Howland* case law, not defending it. App. at 3.

To be sure, historically, appellate courts have not consistently applied the *Howland* interpretation. *E.g.*, Crooks, 61 Wash. L. Rev. at 1546 ("The practice has not reflected the drafters' intended distinction . . . ."). There are several potential explanations. In some cases, courts were likely guided by factors more appropriately considered under RAP 2.3(b)(3) or the principles underlying RAP 1.2(c), granting review out of a need "to serve the ends of justice." *See, e.g.*, *Newman v. Highland Sch.*

Dist. No. 203, 186 Wn.2d 769, 776, 381 P.3d 1188 (2016) (granting review where fruits of appeal would otherwise be lost); *In re Adoption of A.W.A.*, 198 Wn. App. 918, 397 P.3d 150 (2017) (same). And in some cases, it may be that courts have, from time to time, simply been insufficiently rigorous in applying discretionary review standards.[5]

Whatever the reason for the historical practice, there is an increasing consensus that the *Howland* interpretation correctly reflects the meaning of RAP 2.3(b)(2).

The *Howland* interpretation also advances important policies. For one, it provides needed certainty for litigants. *See* Dwyer, 38 Seattle U. L. Rev. at 93 (recognizing "compelling need for clarity"). Uncertainty encourages litigants with non-

[5] Several of the cases cited by the mother, Br. of Pet'r at 27-28 n.10, would have had effects beyond the courtroom. *E.g. Rhinehart v. Seattle Times Co.*, 98 Wn.2d 226, 228, 654 P.2d 673 (1982) (challenge to order prohibiting disclosure of information by press); *In re Dependency of Tyler L.*, 150 Wn. App. 800, 208 P.3d 1287 (2009) (challenge to suspension of visitation). Other cases cited by the mother do not indicate which standard was satisfied.

meritorious requests (but either greater resources or state-provided counsel) to seek review "because there is no clear indication that such relief will be denied." *Id*. At the same time, uncertainty may also discourage litigants with meritorious requests for interlocutory review from seeking relief in light of the cost and uncertain application of the standards. *See id*. The *Howland* interpretation discourages nonmeritorious motions for discretionary review by making clear that they will not be granted. And, by reducing the number of nonmeritorous motions through which commissioners must sift, it highlights those in which review is justified.

The *Howland* interpretation also provides better guidance for appellate courts. It can be difficult for appellate courts to determine whether a given case warrants review. *See Howland*, 180 Wn. App. at 207 ("[P]ractically applying the rule and drawing meaningful distinctions between those cases appropriate for discretionary review and those that are not is difficult."). The *Howland* interpretation addresses that difficulty by providing an

objective factor (i.e., impacts beyond the litigation) when determining whether a case should be addressed under the probable error standard.

Other sound policy considerations also support the *Howland* interpretation. A motion for discretionary review, whether or not granted, increases the cost of litigation for the parties and increases workload and costs for appellate courts. A motion for discretionary review can also introduce delay into the underlying proceedings. *See Minehart*, 156 Wn. App. at 462 (recognizing that interlocutory review undermines " 'the interests of speedy and economical disposition of judicial business' " (quoting *Maybury*, 53 Wn.2d at 721)). Superior court judges may be understandably hesitant to proceed where further actions may be rendered moot if the appellate court grants review and reverses an earlier decision. The additional cost and delay are also unnecessary where the superior court can revise prior orders based on changing circumstances. Each of these considerations favors an interpretation of RAP 2.3(b)(2) that reserves it for cases

that most urgently require appellate review (i.e., those with effects outside the courtroom).

Because the plain meaning of RAP 2.3(b)(2) requires immediate effects beyond the litigation, this Court should adopt the consensus view and affirm the Court of Appeals's reliance on the *Howland* interpretation.

B. Under Any Standard, the Court of Appeals Permissibly Denied Review

1. Even under the mother's theory, there was no substantial alteration of the status quo

Even if this Court were to reject the *Howland* standard, the Court of Appeals still correctly denied review on the basis that intervention by J.R. does not substantially alter the status quo.

In effect, the Court of Appeals provided two alternative grounds for denying review. First, the Court of Appeals articulated the *Howland* standard and concluded that "[h]ere, the juvenile court's probable error merely affects the status of the litigation." Ruling Denying Review at 5. This was a sufficient basis to deny review. The Court of Appeals proceeded, however,

to also reject the mother's argument that there was a substantial alteration of the status quo within the litigation:

> *[The mother] does not show that J.R.'s intervention will in any way change the review of the dependency* or will result in her losing custody of N.G. Aside from J.R.'s attorney now being able to file motions and documents in the dependency, *no party demonstrates how J.R.'s intervention affects the litigation*.

Id. (emphasis added).

The Court of Appeals was correct. After J.R. intervened, the objective of the dependency proceeding remained the same—to return N.G. home. CP 49. And the Department continued to be responsible for providing the mother with remedial services designed to address the parental deficiencies that led to N.G.'s removal from her care. CP 46-47; *see also* RCW 13.34.025. N.G. remained in his existing placement with J.R., and the mother continued to be entitled to regular video and supervised in-person visitation. CP 48. The juvenile court's intervention order did not substantially alter the dependency proceeding.

The mother's arguments about a potential effect are speculative and, in the unlikely event they occur, could be promptly remedied. *See infra*. at 48-49. Certainly, if the juvenile court were to later grant concurrent jurisdiction and J.R. were adjudicated a de facto parent, substantial effects on the dependency proceeding (such as dismissal) would likely follow. But if that occurs, it will be because a court has determined that J.R. has a parent-like relationship with N.G. That would bring the dependency proceeding to a successful conclusion, as N.G. would have a fit parent who can safely care for him. While the parents would still need to finalize an appropriate parenting plan, the State's intervention could end. But that is speculative. For now, the dependency proceeding continues with its remedial focus of safely reuniting N.G. with currently-recognized parents. CP 49.

In sum, even if RAP 2.3(b)(2)'s probable error standard could be satisfied by substantial impacts within the litigation, it

was not satisfied here. The Court of Appeals correctly denied review.

2. The juvenile court did not commit probable error

While the Court of Appeals found probable error in this case, this Court can affirm the Court of Appeals's denial of review on any correct ground. *See State v. Klinker*, 85 Wn.2d 509, 514 n.4, 537 P.2d 268 (1975) ("A lower court's decision, if correct, can be sustained on appeal on any ground within the pleading and proof."). Under a correct interpretation there was no probable error here.

Probable error is challenging to define but requires some meaningful degree of certainty that the superior court erred. Probable error necessarily requires less certainty than obvious error. At the same time, regardless of whether it requires certainty on a more-likely-than-not basis, probable error should at least require something more than the existence of "substantial ground for a difference of opinion," a standard reserved for cases that are certified or stipulated. RAP 2.3(b)(4). That is, "probable

error" requires more than a conclusion that reasonable jurists might disagree. Such a standard is too low to give effect to the principle that interlocutory review is disfavored.

The probable error requirement was not satisfied here, particularly in light of the applicable abuse of discretion standard. As explained more fully below, on the unique facts of this case, the requirements of CR 24(b) were satisfied and the juvenile court acted within its discretion in allowing J.R. to intervene. *See infra* at 37-50 (explaining why the juvenile court did not err). This Court can affirm the denial of discretionary review on this alternative basis.

3. This is not an exceptional case warranting review under RAP 2.3(b)(3)

Though the mother has consistently relied exclusively on RAP 2.3(b)(2) to justify review, Br. of Pet'r at 1-2, review also would not have been warranted under the catchall so-far-departed standard of RAP 2.3(b)(3).

Review under RAP 2.3(b)(3) was not appropriate because this was not a truly exceptional case in which the juvenile court

acted beyond its constitutional and statutory jurisdiction or acted in an arbitrary and capricious manner. *See Vinson*, 172 Wn.2d at 769-70. Nor do other potential considerations justify review. In light of the regular dependency review hearings, the speculative consequences the mother fears would not otherwise evade appellate review.

Further, there was nothing unique or novel about the juvenile court's intervention order. Washington appellate courts have long recognized that, in appropriate circumstances, non-parents may intervene in a dependency proceeding. *E.g.*, *In re Dependency of M.R. v. Dep't of Social & Health Servs.*, 78 Wn. App. 799, 803, 899 P.2d 1286 (1995) ("[A] court may allow a person who has no statutory right to do so, to intervene in a dependency proceeding."). Nor was the order irrevocable. If J.R.'s party status proves problematic, the juvenile court has the authority to dismiss him as a party. *See* CR 21 ("Parties may be dropped . . . by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are

just."); *see also* JuCR 3.10 (providing that any party may move to change, modify, or set aside an order). This is particularly meaningful in a dependency proceeding, where the court conducts a review hearing at least every six months. RCW 13.34.138(1); JuCR 3.9.

In sum, this was not an exceptional situation requiring review under RAP 2.3(b)(3).

C. Review is Not Warranted Under RAP 13.5(b)(2)

In substance, RAP 13.5(b)(2) is identical to RAP 2.3(b)(2), except that it is concerned with whether the *Court of Appeals* committed probable error and the effect of the *Court of Appeals'* action. The Department agrees with the mother that RAP 2.3(b)(2) and RAP 13.5(b)(2) "should be interpreted similarly in regard to breadth." Br. of Pet'r at 49.

The Court of Appeals did not commit probable error. It addressed two alternative interpretations of RAP 2.3(b)(2) and concluded that, under either interpretation, review was not warranted. The Court of Appeals therefore applied the correct

test (as one of the two alternatives) and correctly concluded that, under either test, review was not warranted.

Further, the mother concedes that even when the RAP 2.3(b) standards are satisfied, the Court of Appeals still has discretion to deny review. Br. of Pet'r at 37-38. Yet she does not argue that the Court of Appeals abused that discretion.

The Court of Appeals decision also did not substantially limit the mother's freedom to act or substantially alter the status quo. It had no immediate effect outside the litigation.[6] Under her own proposed standard, the mother argues that a denial of review here substantially limits the "freedom to pursue full discretionary review." Br. of Pet'r at 50. This argument renders the effects

[6] It may sometimes be easier to establish an immediate effect outside the litigation in dependency proceedings than in other cases, as interlocutory orders frequently change the placement of a child, alter services provided to a parent, or require other actions that have an effect beyond the litigation. *See, e.g.*, *In re Welfare of Watson*, 23 Wn. App. 21, 594 P.2d 947 (1979) (recognizing that a change in placement satisfied the RAP 2.3(b)(2) effects prong). Such an effect would still have to be "substantial," however.

prong meaningless. It will *always* be true that a denial of discretionary review necessarily limits a party's ability to pursue "full discretionary review" of the challenged order. Something *substantially* more is required.

This is also a weak case with respect to the effects prong of RAP 13.5(b)(2). The mother seeks review of the order permitting intervention based on her concern about the effect of intervention on *future* orders. *E.g.*, Br. of Pet'r at 45 (identifying concern with "tak[ing] focus away from the goal of remedying parental deficiencies"). But those future orders will be independently subject to discretionary review.

The Court of Appeals' denial of review does not warrant review by this Court under RAP 13.5(b)(2).

D. The Juvenile Court Acted Within Its Discretion in Granting the Motion to Intervene

If this Court concludes that the Court of Appeals correctly denied review or that review under RAP 13.5(b)(2) is not warranted, this Court need not address the merits of the juvenile court's intervention order. *Cf. Chelan Cnty. Dist. Ct.*, 189 Wn.2d

at 632 (affirming appellate court denial of interlocutory writ of review without addressing merits). But if this Court addresses the merits, it should affirm the juvenile court's order.

The juvenile court legitimately exercised its discretion in permitting J.R. to intervene. While intervention in a dependency proceeding by a non-parent will "rarely be appropriate," *In re Welfare of Coverdell v. Dep't of Social & Health Servs.*, 39 Wn. App. 887, 891, 696 P.2d 1241 (1984), it is not categorically prohibited. *Cf.* RCW 13.34.040(1) (allowing "[a]ny person" to file a dependency petition); *see also* JuCR 3.2(a) (same). Instead, permissive intervention is within the trial court's discretion, and an order permitting intervention will be reversed "only when no reasonable person would take the position adopted by the trial court." *In re Dependency of J.H. v. Lutheran Social Servs. of Wash.*, 117 Wn.2d 460, 472, 815 P.2d 1380 (1991) (quoting *Bd. of Regents v. Seattle*, 108 Wn.2d 545, 557, 741 P.2d 11 (1987)); *see also In re Dependency of M.R.*, 78 Wn. App. at 803 ("[A] court may allow a person who has no statutory right to do so, to

intervene in a dependency proceeding."). Under the unique facts of this case, the trial court did not abuse its discretion.

1. The CR 24(b) requirements were satisfied

In order to justify permissive intervention, CR 24(b)(2) requires that (1) a person must establish a "claim or defense" that has "a question of law or fact in common" with "the main action," and (2) the trial court must "consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

There is no meaningful dispute as to the first requirement of CR 24(b)(2). J.R. had filed a de facto parentage petition as to N.G. CP ~~90-96~~94-100. One element is that "[c]ontinuing the relationship between the individual and the child is in the best interest of the child." RCW 26.26A.440(4)(g). In a dependency proceeding, the "child's best interests" guide many decisions, including the child's placement. RCW 13.34.065(5)(b). At the time of the intervention order, N.G. was placed with J.R. CP 45. Whether it was in N.G.'s best interest to continue to be placed

with J.R. was clearly a "question of law or fact in common" between the de facto parentage proceeding and the dependency proceeding. The mother does not appear to contest this. *See* Br. of Pet'r at 53, 55 (noting and not disputing claim of a common issue).

The mother has not demonstrated that the juvenile court failed to consider the potential for undue delay or prejudice. CR 24(b)(2). CR 24(b)(2) does not require an express finding or statement on the record, nor is the Department aware of any case imposing such a requirement.[7] In his motion, J.R. correctly quoted CR 24(b)(2), including the requirement related to

[7] This Court's decision in *In re Parental Rights of K.J.B. v. State*, 187 Wn.2d 592, 387 P.3d 1072 (2017), is distinguishable. There, a statute required that a superior court "'shall consider'" certain factors related to incarceration before terminating parental rights. *Id*. at 601 (quoting RCW 13.34.180(1)(f)). In that case "it appear[ed] that the trial court judge applied an outdated version of RCW 13.34.180(1)(f)," and counsel did not "direct any argument" to the statutory amendments. *Id*. at 604. Here, there is no indication that the juvenile court applied the wrong version of CR 24(b)(2), and counsel for J.R. correctly quoted the rule in the motion to intervene, CP 18.

consideration of undue delay or prejudice. CP 18. The juvenile court was careful to fully consider the mother's position, agreeing to accept her late-filed declaration. RP 20:17-21. The juvenile court then took the matter under advisement and issued a nuanced order, denying intervention as a matter of right but granting permissive intervention. RP 22:4-7. The record thus indicates that the juvenile court gave the motion careful consideration. Particularly in conjunction with the presumption that judges "perform their functions regularly and properly," *Club Envy of Spokane, LLC v. Ridpath Tower Condominium Ass'n*, 184 Wn. App. 593, 606, 337 P.3d 1131 (2014), the mother has not satisfied her burden of establishing that the juvenile court failed to correctly consider the potential for undue prejudice.

The requirement that the superior court consider "undu[e] delay or prejudice," CR 24(b)(2), does not mean that a party that is adverse or hostile is prohibited from intervening. *E.g.*, *Paxton v. City of Bellingham*, 129 Wn. App. 439, 449, 119 P.3d 373 (2005) (upholding permissive intervention by initiative

opponents in action by initiative proponents). Juvenile courts are capable of addressing conflicting interests; it is not uncommon for two parents to have competing objectives. *E.g.*, *In re Dependency of B.F.*, 197 Wn. App. 579, 586, 389 P.3d 748 (2017) (holding that a parent may seek review of juvenile court's refusal to order another parent to complete a service).

The Department acknowledges contrary dicta in *In re Dependency of J.H.*. In that case, this Court stated that "intervention would be appropriate only to the extent that the rights of the foster parents and the rights of the legal parents do not conflict." *In re Dependency of J.H.*, 117 Wn.2d at 471-72. The statement was dicta because the *Dependency of J.H.* court affirmed the denial of intervention "[b]ased on the meager record," not based on a conflict. *Id.* at 472. The statement is also in sharp tension with this Court's more recent decision in *In re Dependency of J.W.H. v. Dep't of Social & Health Servs.*, 147 Wn.2d 687, 57 P.3d 266 (2002), which held that relatives could intervene in a dependency proceeding and squarely rejected the

proposition that intervenors "must either be advocates for reunification with the parents or be silent." *Id*. at 701 (internal quotations omitted).

The statement about conflict in *Dependency of J.H.* is best understood as an imprecise shorthand reference to CR 24's requirement that courts consider whether intervention will "*unduly* delay or prejudice the adjudication of the rights of the original parties," (emphasis added),[8] and the general principle that in the exercise of discretion, intervention in a dependency proceeding should be reserved for rare cases, *see In re Welfare of Coverdell*, 39 Wn. App. at 890-91. But the exercise of discretion must be considered under the unique facts of each case.

[8] The mother's reliance on *In re Welfare of Maurer v. Superior Court for Stevens County*, 12 Wn. App. 637, 530 P.2d 1338 (1975), is misplaced. That decision was clear that it was *not* deciding whether intervention would have been appropriate prior to termination of parental rights. *Id.* at 639.

2. The juvenile court permissibly exercised its discretion

The juvenile court acted within its discretion because (1) J.R. needed to be a party in order to pursue his de facto parentage petition filed in family court and (2) the record supports a reasonably strong showing of J.R.'s likelihood of success on the merits of his petition.

Intervention was necessary in order for J.R. to pursue his de facto parentage petition. Under RCW 13.04.030, the juvenile court had exclusive jurisdiction because N.G. was the subject of a dependency petition. As a result, the family court could not adjudicate J.R.'s de facto parentage action unless the juvenile court granted concurrent jurisdiction. *See* RCW 13.04.030(1)(b), (2). To obtain an order granting concurrent jurisdiction, a person must file a motion, which requires that the movant be a party to the dependency proceeding.[9] In order for the family court to

[9] J.R. previously filed a motion for concurrent jurisdiction under cause numbers for both N.G. and N.G.'s sibling. CP 87-88. As the father, J.R. was a party to the sibling's dependency.

adjudicate J.R.'s de facto parentage petition, J.R. was required to intervene in the dependency proceeding.

The record also amply supports that J.R.'s intervention is in N.G.'s best interest. *See In re Dependency of J.B.S.*, 123 Wn.2d 1, 8-11, 863 P.2d 1344 (1993) (recognizing that, under RCW 13.34.020, "the child's best interests should be paramount"). J.R. has had a longstanding role in N.G.'s life, is the parent of N.G.'s sibling, and has made a reasonably strong showing that he is N.G.'s de facto parent.

The mother is wrong to characterize J.R. as "simply a placement provider." Br. of Pet'r at 55; *see also id*. at 1-2, 10-11, 15-16, 23, 44. In reality, there is a wide spectrum of family-like relationships. This Court expressly recognized this reality in *In re Dependency of J.W.H.* when it held "that there is a valid distinction between foster parent intervenors and intervenors . . . who are maintaining a third party custody action and have been

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The motion was apparently improper as to N.G.'s dependency, but no party objected on that basis.

granted temporary custody of the children who are the subject of the dependency action." *In re Dependency of J.W.H.*, 147 Wn.2d at 699; *see also In re Dependency of C.R.O'F.*, 19 Wn. App. 2d 1, 493 P.3d 1235 (2021) (holding relative who presented prima facie de facto parentage showing was entitled to intervene).[10]

Similar to the relatives in *J.W.H.*, J.R. was pursuing a de facto parentage action, and N.G. was placed in his home. In exercising discretion under CR 24(b), juvenile courts appropriately consider the strength of the pending de facto parentage action. In this case, the record supported that J.R. could be adjudicated a de facto parent.

J.R. has been part of N.G.'s life since N.G. was two years old. CP 31. For years, J.R. was formally N.G.'s stepfather. *Id*.

[10] The result in *C.R.O'F.* was apparently driven by the fact that "adoption was imminent." *Id*. at 12. Like the mother, Br. of Pet'r at 21-22, the Department has significant concerns with the specific holding of *In re Dependency of C.R.O'F.* related to intervention of right. But the Department agrees with the general principle of *C.R.O'F.* and *Dependency of J.W.H.* that the strength of a de facto parentage claim should be relevant to the intervention.

Even after the dissolution of the marriage between the mother and J.R., N.G. continued to visit J.R. CP 25-26, 31-32, 102. According to N.G.'s guardian ad litem, "[N.G.] likes living with [J.R.] and refers to him as 'Dad,'" and the two "have a bonded relationship that is parent-child in nature." CP 102. These facts support permissive intervention by J.R. *See In re Adoption of M.J.W.*, 8 Wn. App. 2d 906, 919, 438 P.3d 1244 (2019) (holding that courts appropriately consider factors such as the length and strength of the relationship between the child and the proposed intervenor).

Not only has J.R. been an important figure to N.G. for almost all of N.G.'s life, J.R. is also the parent of N.G.'s sibling. Under RCW 13.34.030(23)(e), this makes J.R. a "relative" for purposes of chapter 13.34 RCW. *But cf.* CP 40 (referring to J.R. as "suitable person"). Dependency statutes recognize the importance of sibling relationships. *E.g.*, RCW 13.34.025(1)(a); *see also* Laws of 2002, ch. 52 § 1. And while N.G. "was struggling with not residing with his Mother, . . . he does not want

to be separated from his half-brother . . . who resides with [J.R.]" CP 102.

For each of these reasons, the record adequately supported that J.R.'s intervention was in the best interest of N.G.

Despite the unique circumstances justifying intervention, the mother nonetheless contends that the juvenile court abused its discretion because J.R.'s participation might frustrate the objective of family reunification and remedying the mother's parental deficiencies. *E.g.*, Br. of Pet'r at 8-9. This argument is contrary to the record, speculative, and premature.

The Department agrees that a dependency proceeding is appropriately focused on providing remedial services and reuniting the child with the child's family. *See* RCW 13.34.025. Contrary to the mother's argument, however, nothing in the intervention order alters the objective of the dependency proceeding; it simply allows J.R. to participate as a party. *See* CP 52. The mother repeatedly expresses concern that J.R.'s advocacy will undermine her ability to reunify with N.G. *E.g.*,

Br. of Pet'r at 45. But the record demonstrates that, even after the briefing on the motion to intervene, the juvenile court entered a dependency review hearing order maintaining the objective of returning N.G. home, providing for regular visitation, and ordering remedial services. CP 46-49.

Further, if J.R. misuses his party status, the juvenile court can promptly remove him as a party or take other appropriate action. CR 21; JuCR 3.10. And should existing safeguards fail, and J.R.'s participation leads the juvenile court to significantly depart from the accepted and usual course of a dependency proceeding, the mother will have a strong argument in support of prompt interlocutory review of the offending order under RAP 2.3(b)(3) or through relaxation of the RAP 2.3(b) standards under RAP 1.2(c).

To be clear, the Department does not contend that the juvenile court was *required* to exercise its discretion to permit intervention. Reasonable jurists might have exercised their discretion to deny permissive intervention in these

circumstances. But the mother cannot satisfy her burden of establishing that "'no reasonable person would take the position adopted by the trial court.'" *In re Dependency of J.H.*, 117 Wn.2d at 472 (quoting *Bd. of Regents*, 108 Wn.2d at 557). Indeed, N.G.'s guardian ad litem also took the position that "it is in [N.G.]'s best interest for [J.R.] to be authorized a permissive intervention in [N.G.]'s dependency case." CP 103.

In sum, the juvenile court acted within its discretion in determining that, under the unique facts of this case, J.R. should be permitted to intervene.

V. CONCLUSION

This Court should hold that the effects prong of RAP 2.3(b)(2) requires substantial effects outside the litigation and affirm the Court of Appeals's denial of the mother's motion for discretionary review. In the alternative, this Court should hold that review is not warranted under RAP 2.3(b)(2) or RAP 13.5(b)(2) because permitting J.R. to intervene did not substantially impact the dependency proceeding. And if this

Court reaches the merits, it should affirm the juvenile court's order permitting J.R. to intervene under CR 24(b)(2).

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RESPECTFULLY SUBMITTED this 14th day of February, 2022.

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